MARI BOUTIQUE SDN BHD

v.

JAYA JUSCO STORES BHD

HIGH COURT MALAYA, IPOH
ABDULL HAMID EMBONG J
[CIVIL APPEAL NO: 12-28-2003]
1 OCTOBER 2003

LANDLORD AND TENANT: *Distress - Double rent - Trial judge allowed claim for double rent by way of writ of distress - Whether double rent is recoverable by way of distress - Whether double rent is recoverable as damages under s. 28(4)(a) Civil Law Act 1956 - Distress Act 1951, ss. 5(1), (3)*

LANDLORD AND TENANT: *Determination - Holding over - Claim for double rent - Whether recoverable as damages under s. 28(4)(a) Civil Law Act 1956 - Whether irrecoverable by way of distress - Distress Act 1951, ss. 5(1), (3)*

LANDLORD AND TENANT: *Rent - Double rent - Whether recoverable as damages under s. 28(4)(a) Civil Law Act 1956 - Whether irrecoverable by way of distress - Distress Act 1951, ss. 5(1), (3)*

The plaintiff (respondent herein) as landlord and the defendant (appellant herein) as tenant entered into a 3-year tenancy with an option of a 2-year extension. The tenancy was subsequently extended to two years. However, before the expiry of the two-year extension period, the plaintiff terminated the tenancy upon the defendant's failure to pay rent due. The defendant alleged that the tenancy had not expired and stayed put on the premises. The plaintiff then applied *ex parte* to the sessions court for a claim for double rent and entered a writ of distress against the defendant. The defendant applied to set aside the writ of distress but that was dismissed. The defendant now appealed to this court and maintained that double rent was recoverable only as damages under s. 28(4)(a) of the Civil Law Act 1956 ('CLA') and not by way of distress. Further, pursuant to s. 5 of the Distress Act 1951 ('DA'), a warrant of distress could only be issued in respect of recovery of arrears of rent and not double rent. On the other hand, the plaintiff contended that it could recover for double rent by way of distress since the tenancy agreement entered by the parties had provided for it.

The main issue for determination was whether a claim for double rent was recoverable by way of distress pursuant to the DA.

Held:

[1] Section 4 DA does not allow any distrain for arrears of rent by a landlord except in a manner as provided by that Act. Section 5(1) and s. 5(3) DA are provisions for the recovery of arrears of rent. Further, Form 118 provided pursuant to O. 38 r. 2 of the Subordinate Courts Rules 1980 fortifies the view that the DA is provided for and only for the recovery of arrears of rent. There is no provision under the DA for double rental, mesne profit or damages for holding over. (p 855 a-b)

[2] The word 'rent' is not defined under the DA but the interpretation of the word 'tenant' makes reference to it as rent due under an agreement and not a charge arising under an operation of law such as the double rental allowable pursuant to s. 28(4)(a) CLA. The phrase 'shall be chargeable' found in s. 28(4)(a) must be read as merely an enabling one subject to the normal process of proof in a trial. The recovery of double rent under s. 28(4)(a) is therefore not as of right for the landlord but a matter for the court's discretion. The court must first determine whether a former tenant had been guilty of the act of holding over, and if so for what period. Secondly, as in the present case, whether there had been a valid termination of the tenancy. (pp 855 c-h & 856 a-e)

[3] The majority view of the Federal Court in *Krishna Sreedhara v. Chiam Soh Yong Realty Co Ltd* held that double rent was actually damages which might be awarded at the court's discretion. It was not rent but a penal sum which the former tenant had to pay for the inconvenience and loss he caused the landlord in refusing to give vacant possession of the premises on the determination of the tenancy. (pp 856 g-h & 857 a-c)

[4] It was not disputed that cl. 13.3 of the agreement was a remedy available to the plaintiff as the landlord to recover double rent from the tenant holding over. This clause was however a post-termination of the tenancy situation and a summary mode of recovery for double rent is not available under s. 5(3) DA. Section 5(3) provides for a liquidated sum to be claimed and since this double rent is not rent but a penal sum it has to be determined by the ordinary way of an action. (p 857 d-f)

[5] A claim for double rent cannot be made by way of a writ of distress as a writ of distress is a summary remedy strictly for arrears of rent. Double rent is a penal sum and does not fall under the classification of rent that the distress process is available as envisaged under the DA. (p 858 a)

[Appeal allowed with costs.]

Case(s) referred to:

Bah Heng Hong Sdn Bhd v. The Provisional Liquidator Choong Shin Cheong & Anor [1992] 3 CLJ 1421; [1992] 2 CLJ (Rep) 150 ***(foll)***

Hiap Lee (Cheong Leong & Sons) Sdn Bhd v. Unicla Industries Sdn Bhd [1988] 1 CLJ 512; [1988] 1 CLJ (Rep) 579 HC ***(refd)***

Imbi World Sdn Bhd v. Deluxe Tours Sdn Bhd & Another Appeal [1997] 3 CLJ 504 CA ***(refd)***

Krishna Sreedhara Panicka v. Chiam Soh Yong Realty Co Ltd [1983] 1 MLJ 65 ***(refd)***

May Properties Sdn Bhd v. Kong Phew Keng [1996] 4 MLJ 37 ***(not foll)***

Medfiche Sdn Bhd v. Persatuan Teknologi Malaysia [1993] 2 CLJ 345 HC ***(not foll)***

Mohamed Abu Bakar Yusof v. Pa Syed Aboothahir P Ahmed [1990] 1 CLJ 112; [1990] 2 CLJ (Rep) 482 HC ***(refd)***

Printpak Productions (s) Pte Ltd v. Overseas Marketing (s) Pte Ltd (Mallal's Digest, 4th edn 2123) ***(refd)***

Soong Ah Chow & Anor v. Lai Kok Cheng [1984] 1 CLJ 152; [1984] 1 CLJ (Rep) 360 FC ***(refd)***

Wee Tiang Yap v. Chan Chan Brothers [1984] 1 CLJ 156; [1984] 1 CLJ (Rep) 433 FC ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 28(4)(a)

Distress Act 1951, ss. 4, 5(1), (3)

Subordinate Courts Rules 1980, O. 38 r. 2

Distress for Rent Act 1737 [Eng], s. 18

For the appellant/defendant - Haris Ibrahim (En Norisman); M/s Haris & Co
For the respondent/plaintiff - R Jayasingam; M/s WY Chan & Roy

Reported by Usha Thiagarajah

JUDGMENT

Abdull Hamid Embong J:

The defendant had appealed against the decision of the learned Sessions Judge at Ipoh who on 28 March 2003 had dismissed the defendant's application to set aside the writ of distress entered by the plaintiff on 2 April 2002 pursuant to its *ex parte* application to the court. It was not in dispute that the basis of that *ex parte* application was for a claim for double rental against the defendant as a tenant of the plaintiff, in the sum of RM127,581.25.

On 18 December 1997 the parties had entered into a 3-year tenancy agreement beginning 30 July 1997 with an option of a 2-year extension. By letter dated 26 September 2000 the parties seemingly agreed to the 2-year extension of the

tenancy effective 30 July 2000 till 29 July 2002. The plaintiff then, on 20 February 2001, terminated the tenancy on grounds of default by the defendant to pay rent due. The defendant alleged that the tenancy had not expired and stayed put on the rented premises.

The sole legal issue for determination was whether a writ of distress could be obtained for double rental which the defendant maintained is recoverable as damages under s. 28(4)(a) of the Civil Law Act 1956. En. Haris Ibrahim of counsel for the defendant submitted that a distrain for rent is only available to a landlord in the manner provided under the Distress Act 1951 (the DA). He further submitted that pursuant to s. 5 of the DA, a warrant of distress may only be issued in respect of a recovery of rent due or arrears of rent. Double rent, he submitted, cannot be recovered by distress proceedings as was done in this case. Section 5(1) and s. 5(3) of the DA are now reproduced for easy reference:

> 5. Application for warrant of distress.
>
> (1) A landlord or his agent duly authorized in writing may apply *ex parte* to a Judge or Registrar for an order for the issue of a warrant, to be called a warrant of distress, for the recovery of rent due or payable to the landlord by a tenant of any premises for a period not exceeding twelve completed months of the tenancy immediately preceding the date of the application and the Judge or Registrar may make such order accordingly.
>
> (3) Arrears of rent may be distrained for after the determination of the tenancy, provided that either the tenant is still in occupation of the premises in respect of which the rent is claimed to be due, or any goods of the tenant are still on the premises.

Both sections are provisions for the recovery of arrears of rent only. This limitation, learned counsel said is further amplified by the wordings found in Form 118 provided pursuant to O. 38 r. 2 of the Subordinate Courts Rules 1980 which states:

> No. 118
>
> AFFIDAVIT MENYOKONG PERMOHONAN MINTA DISTRESS
>
> (Tajuk Am)
>
> Saya ... beralamat di ... bersumpah (atau berikrar) dan menyatakan bahawa sayalah tuan tanah (atau wakilnya atau ejennya yang diberikuasa dengan sempurnanya) dan bahawa ... (defendan) adalah sebenarnya terhutang kepada ... dengan jumlah wang sebanyak $ ... yang merupakan tunggakan sewa bagi

> premis No ... Malaysia yang kena dibayar untuk selama ... bulan dari ... haribulan ... 19 ... hingga ... haribulan ... 19 ... pada kadar sebanyak $ ... sebulan yang kena dibayar dahulu (tunggakan) pada ... haribulan dalam setiap bulan (dengan ditolak jumlah wang sebanyak $ ... yang dibayar kepada akaun).
>
> Diangkat sumpah (atau diikrarkan) (seperti dalam Borang 71).

The underlined words underscore the purport of the issue of a writ of distress which is for the recovery of arrears in rent, and not for any other sum.

For the plaintiff, En. Jayasingham submitted that there was no dispute that the defendant's tenancy with the plaintiff had been terminated. He said that distraining for double-rent is permissible in law relying heavily on the decision in *Medfiche Sdn Bhd v. Persatuan Teknologi Malaysia* [1993] 2 CLJ 345 in particular on the following passage in the judgment:

> It is the opinion of this Court that if double rent is due it can be distrained for. To hold otherwise would result in an anomalous position where a tenant can avoid distress by terminating his tenancy and then contending as has been done in this case, that until a judgment is obtained in an action at some uncertain date in future, he need not pay any rent at all.

Another case relied upon was *May Properties Sdn Bhd v. Kong Phew Keng* [1996] 4 MLJ 37 where the learned Judicial Commissioner opined:

> The CLA provides the basis for claiming double rental at the owner's option. The owner having exercised his option under the Act, the double rental if not paid is rental due or payable. Section 5(1) of the Distress Act allows an application for the issue of a warrant for the recovery of rent due or payable to the landlord by a tenant of any premises for a period not exceeding twelve completed months of the tenancy immediately preceding the date of the application.

Reference was also made to the case of *Imbi World Sdn Bhd v. Deluxe Tours Sdn Bhd & Another Appeal* [1997] 3 CLJ 504 where the Court of Appeal found the respondent to be in wrongful holding over of the premises after the expiry of the notice to quit and held that the appellants were entitled to double rental. Learned counsel for the plaintiff read cl. 13(3) of the tenancy agreement entered into between the parties and submitted that the plaintiff as landlord may charge double rental on the defendant for wrongful holding over. Clause 13(3) states:

> 13.3. In the event the Tenant continues to remain in occupation of the Demised Premises and fails to surrender or yield up unto the Landlord the whole of the Demised Premises and every part thereof or fails to remove all his goods (which expression where hereinafter used shall include

> personnel and property of every description) from the Demised Premises after the termination of the tenancy pursuant to Clause 13.1 herein, the Tenant shall be liable to pay to the Landlord a sum equivalent to double the Rent payable for the Demised Premises for the period between the date of termination of the tenancy and the date of delivery of vacant possession of the Demised Premises to the Landlord.

In reply En. Haris adverted to the fact that the respondent in *May Properties* was not represented and the court there had no guidance of counsel on the law. He also urged this court not to follow *Medfiche* as that decision was not in accord with the law. Learned counsel stated that that decision never addressed the law as stated by s. 4 DA which says:

> S. 4: No landlord shall distrain for rent except in the manner provided by this Act.

which dictated that distress action in Malaysia must be confined to the limitations under the Distress Act. Secondly, it was argued that although the Federal Court decision of *Krishna Sreedhara Panicka v. Chiam Soh Yong Realty Co Ltd* [1983] 1 MLJ 65 was referred to in *Medfiche* there was no analysis of s. 28(4)(a) of the Civil Law Act 1956 in the latter decision, as to what payments are 'rent' for the purpose of s. 5(1) DA 1951. Thus, the writ of distress issued by the Sessions Court which was purely for the recovery of double rental, a fact not in dispute, must be held to be unlawful.

Medfiche's case was critically analysed in an article by R.R. Sethu entitled *"Distress: An Archaic Remedy In Modern Law"* (see [1994] 1 MLJ cliii). The writer argued that the sum provided in s. 28(4)(a) of the Civil Law Act 1956 is not the contractual rent. That sum is also not agreed rent but a penalty for a failure to quit when the tenancy had been determined. He then referred to a decision by the same learned judge who decided *Medfiche* in the case of *Hiap Lee (Cheong Leong & Sons) Sdn Bhd v. Unicla Industries Sdn Bhd* [1988] 1 CLJ 512; [1988] 1 CLJ (Rep) 579, where on this point, His Lordship said that distress was limited to the goods found on the premises which was the actual subject matter "of the lease agreement under which the rental is in arrears". A person holding over is a trespasser and he cannot be said to be a tenant liable to pay rent under any 'lease' or tenancy agreement (p. clvii of the article). Section 28(4)(a) provides for the landlord to recover double rental by way of compensation for holding over, ie, as against a trespasser, and not as contractual rent against a tenant. The writer argued that the remedy of the landlord is to recover double rent, as damages, by an action and not by distress. The writer concluded that the learned judge in *Medfiche* was in error to hold

that double rental may be distrained by relying on English law which allows for such a process. The source for that in England is s. 18 of the Distress for Rent Act 1737 which provides:

> And whereas great inconveniences have happened and may happen to landlords whose tenants have power to determine their leases, by giving notice to quit the premises by them holden, and yet refusing to deliver up the possession when the landlord hath agreed with another tenant for the same: Be it further enacted ... that from and after (24 June 1738) in case any tenant or tenants shall give notice of his, her, or their intention to quit the premises ... at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained, that then the said tenant or tenants ... shall from thenceforward pay to the landlord ... double the rent or sum which he, she or they should otherwise have paid, to be levied, sued for, and recovered at the same times and in the same manner as the single rent or sum before the giving of such notice, could be levied, sued for, or recovered; and such double rent or sum shall continue to be paid during all the time such tenant or tenants shall continue in possession as aforesaid.

It was pointed out that there is no similar section in our Distress Act 1951. Further, that section is limited to cases where a tenant, who had given notice to quit, remained in occupation, thus making him liable to pay double rent and equates the recovery of double rent in the same way as single rent is recoverable. Thus, that provision is inapplicable in this country and cannot be a sound foundation in *Medfiche*'s case; the tenant there had not given a notice to quit.

The writer next argued that the learned judge in *Medfiche* was wrong in relying on a passage in Landlord & Tenant by Lye Lin Hen which stated that:

> It should be noted that a claim for double value cannot be distrained for as it is not rent and there is no relief in equity. However, a claim for double rent is recoverable either by **action or by distress**, up to the time that the tenant quits. (emphasis added.)

to found in that case that the landlord may distrain for double rent under s. 28(4)(a) since, unlike the British Landlord and Tenant Act 1730, which deals only with double value, s. 28(4)(a) deals with both double rent and double value giving the landlord an election, and concludes that both double rent and double value are penalties and not rent under a tenancy.

I am in agreement with the stand taken by the defendant here and, with respect, confirm the view of R.R. Sethu in his article as stating the correct interpretation of the law. Sadly, I have to depart from the decision in *Medfiche*. In the local context, distress clearly is governed by statute and the starting point in

determining the issue at hand must be s. 4 of the DA which disallows any distrain for arrears of rent by a landlord except in a manner as provided by that Act. Section 5(1) allows the issue of a writ of distress for the recovery of rent due or payable to the landlord. Section 5(3) allows for a distrain any arrears of rent upon satisfaction of two conditions, namely, either the tenant is still in occupation of the rented premises or that the goods of that tenant remain on the premises. Sub-section (1) addresses a situation where the tenancy is still subsisting and sub-s. (3) is a post termination of the tenancy situation. Both situations however are provisions for the recovery of arrears of rent, the phrases 'rent due' and 'arrears of rent' being, in my view, equivalent in meaning. Form 118 referred to earlier fortifies my view that the DA is provided for and only for the recovery of arrears of rent. There is no provision under the DA for double rental, mesne profit or damages for holding over. Although the word 'rent' is not defined under the DA, the interpretation of the word 'tenant' makes reference to it, stating that:

> "tenant" means any person from whom the landlord claims rent to be **due under any lease, sub-lease or agreement** (emphasis added).

The underlined words thus refer to a rent due under an agreement, and not a charge arising under an operation of law such as the double rental allowable pursuant to s. 28(4)(a) Civil Law Act 1956. This section is now reproduced for easy reference:

> 28(4)(a) Every tenant holding over after the determination of his tenancy shall be chargeable at the option of his landlord, with double the amount of his rent until possession is given up by him or with double the value during the period of detention of the land or premises so detained, whether notice to that effect has been given or not.

The phrase 'shall be chargeable' found therein must be read as merely an enabling one, subject to the normal process of proof in a trial. The recovery of double rent under s. 28(4)(a) is thus not as of right for the landlord but a matter of the court's discretion. The landlord therefore cannot proceed by way of summary process under the DA. The case of *Soong Ah Chow & Anor v. Lai Kok Cheng* [1984] 1 CLJ 152; [1984] 1 CLJ (Rep) 360, is authority for this proposition where the Federal Court said:

> Section 28(4)(a) of the Civil Law Act 1956 provides that every tenant holding over after the determination of his tenancy shall be chargeable, at the option of his landlord, with double rental until possession is given up by him. The effect of section 28(4)(a) was examined in *Krishna Sreedhara Panicka v. Chiam Soh Yong Realty Co. Ltd*. The majority judgment held the view that

> the court has discretion when to impose double rent. It seems to me that the legislature's choice of the words "shall be chargeable" clearly implies some discretion.

This means that, in a proper case, the court in exercising its discretion may disallow for a claim of double-rent, or determine its quantum depending on the circumstances of the case. In *Mohamed Abu Bakar s/o Yusof v. PA Syed Aboothahir s/o P Ahmed* [1990] 1 CLJ 112; [1990] 2 CLJ (Rep) 482, Edgar Joseph Jr J puts it in this way:

> By s. 28(4) of the Civil Law Act 1956 (Rev 1972), power is conferred upon the court to award damages and/or mesne profits in actions for recovery of immovable property, when the occupant has wrongfully held over, from date of accrual of the cause of action to the date when possession is handed over.
>
> If the court decides to exercise that power, two questions will arise for decision, namely, (1) what was the period during which the occupant wrongfully held over?; and (2) what was the quantum of damages and/or mesne profits payable? Having regard to the circumstances of this case, as appears from this judgment, I can think of no good reason why the plaintiff should be denied their damages or mesne profits and, indeed, counsel for the defendant mentioned none.

The above two cases illustrate the need for an adjudication process before the court can determine damages of either double rent or value. In the first instance the court must determine whether a former tenant had been guilty of the act of holding over, and if so for what period? Secondly, there may arise, as in the instant case, a dispute on whether there had been a valid termination of the tenancy. (See para 6 of defendant's affidavit dated 20 May 2002). This too needs to be resolved by way of an action as was held by T.S. Sinnathuray J in the Singapore case of *Printpak Productions (s) Pte Ltd v. Overseas Marketing (s) Pte Ltd* (Mallal's Digest, Fourth Edition 2123):

> the issue whether the tenancy had been terminated must be resolved in landlord and tenant proceedings and is not one that can be taken in a case where a writ of distress had been issued.

In *Krishna Sreedhara v. Chiam Soh Yong Realty Co Ltd* [1983] 1 MLJ 65, it was argued for the respondent that the learned trial judge was wrong in not awarding double rent contending that it ought to be given as there is no question of a discretion given to the judge. The majority view of the Federal Court held that double rent is actually damages which may be awarded at the court's discretion. In his judgment Lee Hun Hoe CJ (Borneo) said this, in reference to s. 28(4)(a):

> However, the legislature has, in another Act, used the words "double the amount of his rent". The respondents' claim is **actually not rent but a penal sum which the former tenant has to pay** for the inconvenience and loss he causes the landlord in refusing to give vacant possession of the premises on the determination of the tenancy. The provision, being penal in nature, must be construed with some degree of stricture. **In awarding damages the court always has a discretion.** Respondents are asking the court to apply the doctrine of relation back. Damages can only be recovered as from the determination of the lease, whatever form it may take, whether by effluxion of time, notice to quit or by re-entry under a proviso for that purpose. In our case the conduct of the parties were such that the learned Judge had to decide as to the best course to take in the absence of any authority to guide him. The learned Judge was of the view that the parties had come to some sort of understanding and considered it to be unconscionable for respondents to claim double rent from the expiry of the notice. (emphasis added)

In *Wee Tiang Yap v. Chan Chan Brothers* [1984] 1 CLJ 156; [1984] 1 CLJ (Rep) 433 the Federal Court equated double rent as a form of damages for trespass.

The abovecited decisions are now relied upon to dismiss the plaintiff's contention here that it may recover for double rent summarily, by way of writ of distress, since the tenancy agreement had provided for it in cl. 13.3. It cannot be disputed that cl. 13.3 is a remedy available to the plaintiff as the landlord, to recover double rent from the tenant holding over. This clause is however a post-termination of the tenancy situation and as stated earlier, a summary mode of recovery for double rent is not available under s. 5(3) of the DA. This clause, in my view, provides for a liquidated sum to be claimed and since this double rent is not rent but a penal sum, to borrow its description by Lee Hun Hoe CJ (Borneo), it has therefore to be determined by ordinary way of an action. In other words, a landlord cannot distrain for double-rent, this sum not being arrears of rent. To allow the distress process for double-rent would mean extending its statutory connotation and such a remedy would in my view be *ultra vires* s. 5 of the DA.

Of the authorities cited by the plaintiff only the case of *May Properties Sdn Bhd* is directly in point to the question at hand. In that case, recovery for double rent was allowed by a writ of distress. However the issue on its legality was not addressed by the court. This is not surprising since the respondent there appeared in person. As such the learned judge there did not have the benefit of legal arguments as this court had. For this reason and my view earlier expressed, this court cannot accede to learned counsel of the plaintiff's submission that that decision ought to be followed.

In conclusion it is now held that a claim for double rent cannot be made by way of a writ of distress which is a summary remedy strictly for arrears of rent. Double rent, which is a penal sum does not fall under the classification of rent for which the distress process is available as envisaged under the Act. I agree with the view held by James Foong J in *Bah Heng Hong Sdn Bhd v. The Provisional Liquidator Choong Shin Cheong & Anor* [1992] 3 CLJ 1421; [1992] 2 CLJ (Rep) 150 who said:

> **The Distress Act 1951 clearly provides for claims of arrears of rental. There are no provisions whatsoever therein to provide for distress on damages.** The plaintiff's themselves have clearly and expressly used the word "rental" in their distress proceeding and I do not think it can mean any other thing except what he word "rental" is meant to mean.
>
> "Damages for holding over" may be a type of damages for breach of tenancy but, in this case, liquidated damages are already provided for under the terms of the tenancy agreement. Therefore what was the purpose of the plaintiffs' claim for "damages for holding over" when their claim for damages was already defined. (emphasis added)

For these reasons, this appeal by the defendant is allowed with costs. The writ of distress dated 12 May 2001 issued by the Sessions Court at Ipoh is ordered to be set aside.